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FILED
MAY 12 1961
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 726

FRED CODUTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. EAkview 5-6581

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Fred Coduto, Petitioner in the above entitled cause prays that this Court grant rehearing of its order of April 17, 1961, denying the petition for writ of certiorari, ... U. S. ....., and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case as prayed for in the petition filed February 15, 1961, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. The sentence of the United States District Court for the Northern District of Illinois, Eastern Division, in this cause, is void for failure of the District Judge to comply with the provisions of Rule 32 of the Federal Rules of Criminal Procedure in that he failed to afford either the petitioner or his attorney the opportunity to present matter in mitigation of sentence. This fact was recognized by the Assistant United States Attorney who prosecuted the case; for, after sentence was imposed, he moved the court to set aside the sentence and afford the petitioner the opportunity for presenting matter in mitigation. (Transcript of Proceedings, page 1514 *et seq.*)

As recently as February 27, 1961, this Court reaffirmed the rule that the defendant in a criminal case must be afforded a right to make a statement in mitigation. *Green* v. *United States,* ..... U.S. ....., 81 S. Ct. 653. In the *Green* case the Court found that the defendant had been given the opportunity. In the present case there is no doubt but that the petitioner was not afforded the opportunity to make a statement in mitigation. Nor was his attorney given the opportunity. These facts must be admitted by the Government for it was the Government's attorney who prosecuted the case who made the following motion after sentence had been imposed:

> By Mr. Montgomery: Your Honor, this is the Government's motion that I am making for the reason that when the defendants were sentenced, they were not afforded an opportunity in their own persons or by their counsel to make a statement before imposition of sentence . . . (Transcript of proceedings, page 1514)

The sentence imposed was forty years consisting of two consecutive twenty year sentences. The defendant is not eligible for parole under the law as the offense was for

violation of the narcotics laws. The evidence introduced at the trial showed that the petitioner was a man of prior good reputation in the community for being a peaceable and law abiding citizen. (Transcript of Proceeding, pages 1083-1091) Had he been given an opportunity to be heard the judgment and the sentence of the court could have been different.

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

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Attorney for Petitioner